



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 39 OF 2015

(AS CONSOLIDATED WITH SUCCESSION CAUSE NO. 101 OF 2015)

IN THE MATTER OF THE ESTATE OF KIPLAGAT KIGEN (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR CONTEMPT OF COURT

BETWEEN

JULIUS KIMELI LANGAT.....1ST PETITIONER

CECILIA CHEMUTAI KIPLAGAT.....2ND PETITIONER

AND

BEATRICE CHEPKEMBOI CHUMO.....1ST OBJECTOR

ELIJAH KIPLIMO LAGAT.....2ND OBJECTOR

RULING

[1] The Notice of Motion dated **9 March 2016** was filed herein by the Objector pursuant to **Section 5** of the **Judicature Act Chapter 8** of the **Laws of Kenya** and **Rule 73** of the **Probate and Administration Rules** and any other enabling provision of the law for orders that:

[a] Spent

[b] The Court be pleased to cite and punish the Petitioners for contempt of the Court Order dated **6 January 2016**; and

[c] That costs be in the cause.

[2] The application was premised on the grounds that on the **6 January 2016** the Court issued an order directing that the *status quo* be preserved and that the Objectors to remain in possession of land Parcel No. **MOIBEN/LOLKINYEI BLOCK 8 (CHEBARUS)2** (the Suit Property) pending further orders of the Court; and further that despite the orders, the Petitioners invaded the Suit Property after the Objectors had prepared it for planting and planted the same for their own use, in utter disregard of the court order.

[3] In the Supporting Affidavit sworn by the 1st Objector on **9 March 2016**, it was averred by her that she used to live on the Suit Property even prior to the demise of the deceased as the same is her matrimonial home; and that after the death of the deceased, she petitioned for Grant of Letters of Administration in her capacity as the widow of the deceased in **Eldoret High Court Succession Cause No. 101 of 2015**, which is still pending. She further averred that on **6 January 2016**, the Court issued an order herein directing that the *status quo* be maintained pending further orders; and that although the Petitioners were duly served with the order, they went ahead and ignored the same by planting their crops thereon in complete disregard of the fact that Objectors had already prepared the farm for planting. The 1st Objector annexed to her affidavit copies of the Order, Affidavit of Service as well as photographs showing the Petitioners at work on the Suit Property.

[4] In their Replying Affidavit sworn on **13 May 2016**, the Petitioners averred that they were never served with any orders; and that they

only got to know of the existence of the said orders when they were served with the instant application. They further denied having interfered with the *status quo* order as they never ejected or evicted the Objectors from the Suit Property; and that the allegation of planting on the disputed land is “...neither here nor there...” They contended that even before the death of the deceased, they used to utilize a portion of the parcel of land only for purposes of planting maize. According to them, the Objectors have failed to provide any iota of evidence demonstrating that they have interfered with their occupation in any way.

[5] The Petitioners further denied that the 1st Objector is a widow of the deceased as alleged in Paragraph 2 of the Supporting Affidavit; and therefore asserted that she is not a beneficiary of the deceased. They contended that she is married to one **Michael Kipkoech** and that they were in the process of divorce. In proof thereof, the Petitioners annexed copies of the Marriage Certificate and the Petition as Annexures 1a and 1b to the Replying Affidavit. They added that the Objectors have been trying to frustrate them, yet they are the *bona fide* beneficiaries of the deceased. They accordingly asked for the dismissal of the application.

[6] The 1st Objector filed a Supplementary Affidavit in response to the Petitioners’ averments reiterating that, although she had prepared the Suit Property for planting, the Petitioners interrupted her activities by planting maize for themselves on the property; and that they also threatened and assaulted her for which she made a complaint to the **Moiben Police Station** under **OB No. 19/29/1/2016** and **OB No. 14/21/2/2016**. She maintained that she was the one utilizing the land as at the time the *status quo* order was given. She annexed additional photographs of the farm as well as a letter dated **18 May 2016** from the office of the Assistant Chief of Mumetet Sub-location, confirming that the Suit Property was forcefully planted by the Petitioners on **5 March 2016** in spite of the court order.

[7] The application was disposed of by way of written submissions pursuant to the directions issued herein on **4 December 2018**. In their written submissions dated **25 March 2019**, the Objectors stressed the point that the Order of **6 January 2016** was duly extracted and served on the Petitioners on **8 January 2016**; and that the said order had a penal notice appended thereto warning the Petitioners of the consequences of disobedience. Counsel for the Objectors relied on **Sam Nyamweya & Others vs. Kenya Premier League Ltd and Others** [2015] eKLR to underscore the Objectors’ assertion that the Petitioners acted willfully and in defiance of the court order; and therefore all the requirements pertinent to such applications have been proved. Counsel also relied on the cases of **Econet Wireless Kenya Ltd vs. Minister for Information & Communication & Antother** [2005] 1 KLR 828 and **Republic vs. The Speaker, Nairobi County Assembly & Another, Ex Parte Robert Ayisi & Others** [2017] eKLR for the proposition that court orders must be obeyed unless and until set aside.

[8] The Petitioners’ written submissions dated **15 May 2019**, filed on their behalf by the firm of **M/s Rioba Omboto & Co. Advocates**, were to the effect that since the *status quo* was not clarified, the Petitioners cannot be cited for contempt, granted that, at all material times, they were also entitled to cultivate a portion of the Suit Property. The Petitioners cited the case of **Peter Nyamu Karagui vs. A.G. of Kenya & 5 Others** for the argument that the slightest ambiguity in an order can invalidate an application for committal for contempt, granted the standard of proof in such matters. Counsel further urged the Court to find that service of the order is questionable given the discrepancies in the affidavit of service as to whether service was accepted or not.

[9] In **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another** [2005] KLR 828, the obligation to obey court orders was well explicated thus:

"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void."

[10] Thus, the elements that the Objectors herein needed to prove are:

[a] that the Order of **6 January 2016** was clear, unambiguous and binding on the Petitioners;

[b] that the Petitioners had knowledge of or proper notice of the terms of that Order;

[c] that the Petitioners have deliberately failed to obey the terms of the Order;

(see **Katsuri Limited vs. Kapurchand Depar Shah** [2016] eKLR)

[11] The court record shows that the Order issued on **6 January 2016** was made by consent on **19 October 2015** before **Hon. Kimondo, J.** It was therefore made in the presence of Counsel for the parties. There is further evidence that the said order was extracted and served on the Petitioners. Whether or not they referred the process server to their Advocate is immaterial. It suffices that they had notice of the order. Indeed, in the case of **Shimmers Plaza Limited vs. National Bank of Kenya Limited** [2015] eKLR the Court of Appeal made it clear that:

"...this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved... Kenya's growing jurisprudence right from the High Court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for purposes of contempt proceedings. For instance, Lenaola, J. in the case of Basil Criticos vs Attorney General and 8 Others [2012] eKLR pronounced himself as follows:

"...the law has changed and as it stands today knowledge supersedes personal service... where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary."

[12] In the premises, the pertinent issue for my determination is whether the order, as extracted, was clear and unambiguous; and whether the Objectors have shown to the satisfaction of the Court that the Petitioners deliberately failed to obey the terms of the Order. The proceedings of **19 October 2015** show that, in the presence of **Mr. Okara** for the Petitioners and **Mr. Kamau** for the Objectors, the following order was recorded in respect of the application dated **17 March 2015**:

“By consent the application dated 17.3.2015 be adjourned to open court at the hearing of the main objection proceedings. In the meantime, the status quo now obtaining be preserved. That is to say that the Objector shall remain on Parcel No. Moiben/Lolkinyei Block 8(Chebarus)2 but shall not lease or transfer it until further orders of the Court. Interim orders earlier granted on 31.7.2015 are extended. Mention on 12th November 2015 for further directions.”

[13] As rightly pointed out by the Petitioners, there is no proof that they have interrupted the Objectors’ occupation of the Suit Property. I have also sought to ascertain the orders; and the record shows that on **31 July 2015**, the Court granted Prayer 2 of the Petitioners’ application dated **16 June 2015**, by which they sought interim orders restraining the Objectors from wasting, alienating, selling, charging, transferring or leasing the Suit Property among other assets forming the estate of the deceased, pending the hearing and determination of the application *inter partes*. In the premises, a valid point was raised as to exactly what the status quo was as at **19 October 2015** when the consent was recorded; particularly noting that learned counsel were themselves uncertain about the *status quo*. **Mr. Kamau** in particular is on record as having stated thus:

“The application dated 17.3.2015 cannot fairly be determined at this stage as we have to determine the Objection. Status quo should be determined.”

And **Mr. Okara** conceded that if they agreed on the *status quo* then the objection could be stayed. There appears to be no such agreement on the record other than what formed part of the consent order.

[14] In the premises, I am in agreement that there was some ambiguity as to whether or not the Petitioners could continue cultivating a portion of the Suit Property. In **Gatharia K. Mutikika vs. Baharini Farm Ltd** [1985] KLR 227 it was held that:

“The courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved... The guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge...The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject.”

[15] In the premises, I am not convinced that a good case for citing the Petitioners for contempt of court has been made herein. I would accordingly dismiss the application dated **9 March 2016** with an order that the costs thereof be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 5TH DAY OF DECEMBER, 2019

OLGA SEWE

JUDGE